

## Chicago-Kent Law Review

---

Volume 90

Issue 1 *Shari'a and Halakha in North America*

Article 4

---

1-30-2015

# Installations of Jewish Law in Public Urban Space: An American Eruv Controversy

Charlotte Elisheva Fonrobert

*Stanford University*

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [First Amendment Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Charlotte E. Fonrobert, *Installations of Jewish Law in Public Urban Space: An American Eruv Controversy*, 90 Chi.-Kent L. Rev. 63 (2015).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/4>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## INSTALLATIONS OF JEWISH LAW IN PUBLIC URBAN SPACE: AN AMERICAN ERUV CONTROVERSY

CHARLOTTE ELISHEVA FONROBERT\*

During the past two decades, the Jewish practice referred to in short as *eruv* has been brought to the attention of a variety of public forums in the United States. In a few prominent cases, it has even been litigated in American courts, such as in the Tenaflly case<sup>1</sup> and the ongoing case in the Hamptons, which I discuss below. Briefly, an *eruv* is a practice and, more accurately, an installation aiding the observance of Sabbath law as defined and discussed by traditional rabbinic law or *halakhah*. As per strictures of Jewish law, observant Jews are prohibited on the Sabbath—among other things—to carry anything out of their houses, for instance across the street, to the synagogue or into a neighbor's house. However, at the same time as prohibiting such behavior on the Sabbath, rabbinic law (*halakhah*) devised a set of practices—the *eruv*—allowing observant Jews to circumvent this particular Sabbath prohibition under certain circumstances. In the modern context, and especially in larger urban contexts, this involves the installation of boundary-marking structures where pre-existing boundary-markers, such as fences, walls, or creeks, are not sufficient to operate as a boundary.<sup>2</sup>

\* Charlotte Elisheva Fonrobert is Associate Professor of Religious Studies in the Department of Religious Studies at Stanford University, and the Director of the Taube Center for Jewish Studies. She is currently working on a monograph on the *eruv*, entitled *Replacing the Nation: Judaism, Diaspora, and Neighborhood*, and has published a number of articles on the topic.

1. George James, *Church and State; Drawing a Line in Tenaflly*, N.Y. TIMES, Dec. 31, 2000, <http://www.nytimes.com/2000/12/31/nyregion/church-and-state-drawing-a-line-in-tenaflly.html>. See generally Susan H. Lees, *Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenaflly*, *New Jersey*, 27 CONTEMP. JEWRY 42 (2007), for an ethnographic account of the controversy, and Shira J. Schlaff, *Using an Eruv to Untangle the Boundaries of the Supreme Court's Religion-Clause Jurisprudence*, 5 J. CONST. L. 831 (2003), for a legal analysis of the *eruv* controversy, although not solely focused on the Tenaflly case.

2. Classical rabbinic law in which prescriptions for the establishment of an *eruv* community originate assumes pre-existing boundaries, paradigmatically the walls either of courtyards shared by a number of residents, or of alleyways, as they were typical in the ancient Mediterranean urban environment. See Charlotte Elisheva Fonrobert, *From Separatism to Urbanism: The Dead Sea Scrolls and the Origins of the Rabbinic 'Eruv*, 11 DEAD SEA DISCOVERIES 43, 43–71 (2004). Accordingly, no installation of boundary-marking structures was required, other than marking the entrance to such courtyards and alleyways. Over the course of the history of adapting classical Jewish law to changing urban environments, city-walls of medieval European cities were accepted as pre-existing boundaries. See Boaz Hutterer, *The Courtyard Eruv in the Urban Space, Its Development from the Time of the Mishnah and the Talmud to the Twentieth Century* (2013) (unpublished Ph.D. dissertation, Bar Ilan University) (on file with author). The specific *eruv* installations became a necessity only in modern cities. See Charlotte

It is this installation, which—although relatively minor, relatively invisible, and entirely permeable because symbolic only—requires, by design, the Jewish community to “go public.”<sup>3</sup> In the contemporary controversies, this is first and foremost the case because the installation of the structures involves the public, in many cases in the form of public utility companies and the use of their installations in urban space. In as far as the installation of an *eruv* involves the public and in certain ways lays claim to the public, this particular aspect of Jewish Sabbath observance, therefore, defies the consignment of religion to the private sphere as is the goal of liberal democracies.

That the installation of *eruv* in American urban contexts should become a matter of public controversy is by no means self-evident, as those who regard this as an issue for church-state legislation would have us believe. Urban *eruv* have been installed in many American cities without controversy since the 1970s.<sup>4</sup> In fact, in some places, like New York, they have existed for over a century.<sup>5</sup> The reasons for the recent controversies ending up in litigation are therefore complex, not only the result of more or less willful misperceptions of what is actually involved and at stake with

Elisheva Fonrobert, *Sabbathdraehte, Sabbathschnuere, and Judentore: The German Century in the History of the Eruv*, in *IT'S A THIN LINE: ERUV FROM TALMUDIC TO MODERN CULTURE* 75–91 (Adam Mintz ed., KTAV Publishing House 2014), for the discussion of a nineteenth century German *eruv* controversy upon de-fortification of the German cities, such as in the case of Würzburg.

3. One of the conditions for the workability of an *eruv*, set by classical rabbinic law itself, is that those seeking to institute an *eruv* that live in mixed neighborhoods and towns have to seek the consent of non-Jews. Such consent takes the form of symbolic rent from representatives of non-Jews for the purposes of the *eruv*. See Charlotte Elisheva Fonrobert, *The Political Symbolism of the Eruv*, 11 JEWISH SOC. STUD. 9, 23–24 (2005), for a discussion of the symbolic rent as a strategy of diaspora. See also Hutterer, *supra* note 2, and Adam Mintz, *Halakhah in America: The History of City Eruvin 1894–1962* (2011) (unpublished Ph.D. dissertation, New York University) (on file with author), for a discussion of the historical development of the implementation of this component of the *eruv* installation. Lease agreements spelling out the terms are available to read online, for example, *Kinyan Kesef*, GREATER BOSTON ERUV CORPORATION, [www.bostoneruv.org/kinyan\\_kesef.htm](http://www.bostoneruv.org/kinyan_kesef.htm) (last visited Nov. 25, 2014). For an example in New York City from 1959, displayed at the Yeshiva University Museum in an *eruv* exhibition, see Zachary Paul Levine's curatorial article, *It's A Thin Line: The Eruv and Jewish Community in New York and Beyond*, in *IT'S A THIN LINE: ERUV FROM TALMUDIC TO MODERN CULTURE* 24 (Adam Mintz ed., KTAV Publishing House 2014).

4. This is pointed out by historians, as well as, time and again, the proponents of urban *eruv* installations and their legal representatives.

5. Mintz, *supra* note 3, focuses on the *eruv* in New York, St. Louis and Toronto, but reaches only to 1962. The proliferation of modern *eruv* installations in the United States can be attributed to a variety of factors that I cannot rehearse here, other than invoking the sociological and anthropological scholarship that traces changes in modern orthodox communities since the 1970s and the younger generation's great interest in older traditions. See generally SAM FREEDMAN, *JEW VS. JEW: THE STRUGGLE FOR THE SOUL OF AMERICAN JEWRY* (2000). See Lees, *supra* note 1, at 61, for a discussion of the argument proposed by Rabbi Jachter, who served as an expert witness in the U.S. Appeals Court in the Tenafly case in 2002. Rabbi Jachter attributes that proliferation to the effects of the Civil Rights Acts of the 1960s that enhanced assertiveness of minority groups in the United States.

the installation of an *eruv*. They arguably have to do with local politics, with changing demographics and the perception or anticipation of such a change, and with deepening divisions among American Jews, between liberal and orthodox Jews. Finally, and perhaps most importantly—for our purposes—such controversies constitute a contestation of religion and visible religiosity in public space.

In what follows, I will discuss the ongoing controversy in the Hamptons, by first providing an analytical description of the case with reference to other controversies, and then by discussing its implications for the larger issues of religion in the public sphere. The reason I want to focus on that specific conflict is not so much because of the particulars of the case. In fact, the various controversies share quite a few aspects in common, the particularities of local politics notwithstanding. However, in this case, my own scholarly work on the origin and the cultural politics of the *eruv* in the classical rabbinic literature of the first millennium C.E. was not only called upon as providing testimony in the litigation, but became subject of conflicting interpretation in and of itself. History of religion became entangled with the practice of law.

#### I. THE *ERUV* CONTROVERSY IN THE VILLAGE OF WESTHAMPTON BEACH, NY

Two years ago I was contacted by a law firm from New York introducing themselves in the following manner:

We represent a group of persons from diverse backgrounds, but largely reform Jews, who are opposing the *eruv* on constitutional, Establishment Clause grounds. Your name has been given to us as a leading scholar in this area, and a brief review of your impressive CV confirms as much. We are interested in an academic perspective on the issue, both to better educate ourselves about it but also for the purpose of steering clear of some of the understandably emotional or political responses that tend to arise when it is approached from a purely religious angle. In that regard, the litigation is likewise focused on the purely constitutional legal questions and is not in any way attempting to advance an anti-orthodox sentiment.<sup>6</sup>

I was intrigued, of course, in the sudden interest in my academic work in classical rabbinic legal literature by contemporary law. It did not take a lot of research to figure out that the *eruv* controversy that this lawyer alluded to was one that had caught the attention of the wider public not only in

6. Email from Timothy F. Hill to author (Aug. 10, 2012) (on file with author).

newspaper reports, as was the case in other controversies.<sup>7</sup> Rather, this particular controversy had acquired some notoriety by being featured on Jon Stewart's *The Daily Show* on the Comedy Central Channel in a faux interview segment by Wyatt Cenac, "The Thin Jew Line".<sup>8</sup> The evolving litigation of the case is well documented in the public sphere at the municipal website of The Village of Westhampton Beach, which presents a collection of the relevant court documents.<sup>9</sup>

The background of the controversy and evolution of the litigation can only be told in brief here.<sup>10</sup> As a scholar of classic Jewish law and literature of the first millennium C.E., also known as rabbinic law and literature, I remained impartial to the litigation, even as I was drawn into that litigation itself. As a historian of religion, I consider this controversy as one particular instantiation of the long history of social dynamics between Jews in all their variety, and between Jews and non-Jews, that the institution of the *eruv* has rendered and continues to render visible. In as much as we can think about the *eruv* as a form of going public for Jewish observance of traditional Jewish law, I want to consider the relevance of the Westhampton controversy to our thinking about the mapping of religion onto the public and private divide underwriting liberal democracy.

7. See Joseph Berger, *Orthodox Jews' Request Divides a Resort Village*, N.Y. TIMES, June 22, 2008, <http://www.nytimes.com/2008/06/22/nyregion/nyregionspecial2/22mainli.html>; see also Michael A. Helfand, *An Eruv in the Hamptons? Why Not? The Fight over a Proposed Eruv in Westhampton Beach, N.Y., is About Much More Than String and Telephone Lines*, L.A. TIMES, Aug. 15, 2012, <http://articles.latimes.com/2012/aug/15/opinion/la-oe-0815-helfand-eruv-westhampton-sikh-20120815>. For the Tenafly case, see sources cited *supra* note 1. The Palo Alto controversy found reflection mostly in the Jewish Press, for example, Josh Richman, *New Eruv Reopens Old Church-State Debates in Palo Alto*, JEWISH DAILY FORWARD, July 18, 2007, <http://forward.com/articles/11190/new-eruv-reopens-old-church-state-debates-in-p/>.

8. Comedy Central, *The Thin Jew Line*, THE DAILY SHOW (Mar. 23, 2011), <http://thedailyshow.cc.com/videos/1jsrl7/the-thin-jew-line>. Based on personal anecdotal evidence, it appears that *eruv* proponents took a liking of this segment, clearly not so much for its general mockery of what to outsiders must seem like much ado about nothing. But the faux interviews end up ridiculing the exasperation of the opponents much more than the mechanics of the *eruv* installation itself.

9. *Eruv Information and Litigation*, VILLAGE OF WESTHAMPTON BEACH, <http://westhamptonbeach.org/eruv-litigation/> (last updated Aug. 11, 2014).

10. The opponents of the *eruv* in Westhampton Beach established their own website, which details the evolution of the controversy. JEWISH PEOPLE OPPOSED TO THE ERUV, [jpoewhb.com](http://jpoewhb.com) (last visited Nov. 25, 2014). Other controversies have produced extensive ethnographies, with scholars giving credence to the variety of voices recorded in court documentation, minutes, and letters to the editors of local newspapers. For the extended London controversy, see generally Jennifer A. Cousineau, *Making the Northwest London Eruv, 1988–2003: The Construction, Representation and Experience of a Sabbath Space* (2006) (unpublished Ph.D. dissertation, University of California Berkeley) (on file with Gardner Library, University of California Berkeley). For the Palo Alto controversy, which was never litigated in court, see generally John Mandsager, *The 'Eruv: A Space for Negotiating Identity* (May 2002) (unpublished Honors Thesis in Religious Studies, Stanford University) (on file with Green Library, Stanford University). Susan H. Lees' article, *Jewish Space in Suburbia*, provides a brief ethnography of the Tenafly conflict. See *supra* note 1.

In March 2008, when the modern orthodox synagogue in Westhampton Beach was about to celebrate its eighteenth anniversary in that village, the orthodox community proposed the installation of an *eruv*. To that end, the executive director of the orthodox community obtained a license agreement with the public utility companies, in this case the Long Island Power Authority (LIPA), to make use of some of their utility poles and lines, where pre-existing markers in the natural and built environment did not provide a contiguous boundary. A map of the boundaries for the *eruv* proposed in 2008 is readily available online.<sup>11</sup> For the purpose of an *eruv* installation, use of utility poles and telephone lines entails minimal manipulation, namely by the utility companies themselves affixing plastic strips on the poles. In rabbinic law, these plastic strips are referred to as *lechis* (Hebrew) or side-posts of what is to constitute symbolic gateways. In terms of rabbinic law going back to its founding legal text of the second century C.E., the Mishnah, and its interpretations and adaptations thereafter, such plastic strips constitute a modern symbolic emulation of what in the late ancient urban environment were thought of as gateways to a contained residential space, such as the walled courtyard or alleyways.<sup>12</sup> However, in the encounter between rabbinic law and the contemporary U.S. legal system, it is the symbolic valence of these plastic strips that are part of the litigation, as I will discuss.

As the orthodox community of Westhampton Beach came forward with the proposal for the installation of an *eruv*, criticism of the project started to foment, even though the orthodox rabbi employed the classic modern arguments in defense of the *eruv*, namely, “the *eruv* will enable families to push small children in strollers or baby carriages when they go to services on the Sabbath.”<sup>13</sup> What *eruv* proponent would not want to ap-

11. *Map of Proposed Eruv Area 2008*, VILLAGE OF WESTHAMPTON BEACH, <http://westhamptonbeach.org/wp-content/uploads/2012/10/whb-eruv-map-2008.pdf> (last updated Aug. 11, 2014). That map was extended in 2010, after the *eruv* proponents entered into an agreement with Verizon. See VILLAGE OF WESTHAMPTON BEACH, <http://westhamptonbeach.org/wp-content/uploads/2012/10/eruv-map.pdf> (last visited Nov. 25, 2014).

12. HERBERT DANBY, *THE MISHNAH* 121 (Oxford University Press 1933).

13. Letter from Rabbi Marc Schneier to Mayor Conrad Teller, Village of Westhampton Beach Board of Trustees, & Members of the Westhampton Beach Community (May 23, 2008), available at <http://westhamptonbeach.org/wp-content/uploads/2012/10/hampton-synagogue-letter-5-23-08.pdf>. This argument is used over and over again for proposing urban *eruvim* in the contemporary United States. For Tenafly and Rabbi Hershel Schachter’s argument in his testimony to the U.S. Court of Appeals in 2002, see Lees, *supra* note 1, at 45. On the changing role of women in modern orthodox communities as a factor in the modern popularity of urban *eruvim* in the United States, see Blu Greenberg, *The Eruv and the Changing Role of Women*, in *IT’S A THIN LINE: ERUV FROM TALMUDIC TO MODERN CULTURE* 109–21 (Adam Mintz ed., KTAV Publishing House 2014) and Sylvia Barack Fishman, *Sociological Contexts and Complications of Eruv Construction in American Jewish Communities*, in *IT’S A THIN LINE: ERUV FROM TALMUDIC TO MODERN CULTURE*, 121–29 (Adam Mintz ed., KTAV Publishing House

peal to the basic American sense of gender equity and basic concern for the disabled in order to convince non-Jewish authorities of the beneficial effects of the *eruv*? In response to the proposal, opponents of the *eruv* established themselves as a group known as the Jewish People Opposed to the Eruv ("JPOE"), with their own website detailing the controversy and their take on it.<sup>14</sup> It bears emphasizing that this group represents itself quite explicitly and strategically as Jewish:

Jewish People for the Betterment of Westhampton Beach (Known as Jewish People Opposed to the Eruv), a grass roots organization of those of the Jewish faith, their families, friends and neighbors who are homeowners or reside in Westhampton Beach and its environs, is opposed to the erection of an *eruv* by any governmental, quasi-governmental or corporate authority in this community.<sup>15</sup>

Arguably, this aids their strategy of casting the conflict as an intra-Jewish conflict, especially in legal terms. This is then how the law firm that contacted me in the email cited above represented its clients.

In the Tenaflly controversy, as in the Palo Alto controversy, Jews of a variety of liberal religious, political and secular backgrounds provided prominent voices in the opposition, but the opposition did not represent itself as primarily Jewish, or unified under a Jewish umbrella. Susan H. Lees documents the concern voiced in the Tenaflly conflict over the force of the *eruv* to instigate intra-Jewish divisiveness, between "the Reformed Jewish people, Secular Jewish people . . . and Other Orthodox Jewish people who are not members of the sect,"<sup>16</sup> as a motivation by some City Council members to vote against its installation. But the opposition did not incorporate itself in the name of being Jewish.

After initial failure of the *eruv* proposal in the Westhampton controversy, its proponents eventually incorporated themselves as the East End Eruv Association Inc. (EEEE). The forming of *eruv* associations as the entity to carry forth the installation and to be responsible for the maintenance of the installation has of course been the practice in almost every other urban *eruv* proposal. In May 2010, the EEEA entered an agreement

2014). Susan H. Lees rejects the argument that the proliferation of *eruv* installations are to be attributed to "changes in the social position of women among modern Orthodox Jews" in favor of seeing it as about "a concept of community in which whole families constitute the community," where gender forms one sub-set. Lees, *supra* note 1, at 44. Certainly, some contemporary proponents play up "traditional family values," as in the case of the *eruv* in Washington D.C. installed in 1990. See Charlotte E. Fonrobert, *Diaspora Cartography: On the Rabbinic Background of Contemporary Ritual Eruv Practice*, 5 IMAGES: J. JEWISH ART & VISUAL CULTURE 14, 14 (2011). But either way, gender as a strategic argument certainly plays a central role in *eruv* installations, whether controversial or amicable.

14. JEWISH PEOPLE OPPOSED TO THE ERUV, *supra* note 10.

15. *Id.*

16. Council member, Richard Wilson, cited in Lees, *supra* note 1, at 58.

with an additional utility company (Verizon) to make use of their utility poles for the purposes of the installation of the *eruv*, now envisioned as covering a larger area. From there, the social dynamics in the Village, between what had now solidified into two opposing camps, deteriorated to the degree that the Village hired an attorney. The EEEA, in turn, was headed by an attorney who also happened to be a founding member of the Hampton Synagogue. The EEEA filed a lawsuit in Federal Court against the Village in January 2011. That lawsuit suggested that the actions of the defendants—at this point the Village and a number of named individuals—“constitute intentional deprivation of and interference with Plaintiff’s rights under the United States Constitution and statutes, and private contracts entered into between EEEA and independent third parties,”<sup>17</sup> namely the utility companies. That is, the EEEA laid claims to the Free Exercise Clause of the First Amendment. This is also the time when *The Daily Show* became interested in the controversy for its comedic purposes and aired its now famous version of it.

From that point forward, both camps have remained in litigation that has only continued to escalate. In my conversations with legal counsel on both sides, both have different versions of who is to blame for the escalation, and I do not see myself in a position, nor consider it my interest, to assign blame for this. My main interest, to emphasize again, is in understanding the implications of the “publicness” of the *eruv* as an institution to our thinking about the place of religion in the public sphere.

In March 2013, the JPOE and its attorney made a request to the LIPA to terminate its agreement with the *eruv* association. On July 30 of the same year, JPOE filed a lawsuit in U.S. District Court, naming the Village of Westhampton Beach, the EEEA, Verizon New York Inc., and LIPA as defendants.<sup>18</sup> The attorneys for JPOE claimed a violation of the Establishment Clause of the First Amendment to the United States Constitution:

The *eruv* contemplated and intended for imminent construction by Defendant East End Eruv Association (“EEEA”), with the aid and cooperation of defendants Verizon and LIPA, will mark certain wholly public spaces within the Village with religious significance. Indeed, it will invest a large portion of the Village with a narrow and parochial religious function [and thus constitute a violation of the Establishment Clause.]<sup>19</sup>

17. Complaint at 2, *East End Eruv Ass’n, Inc. v. Vill. of Westhampton Beach*, 828 F. Supp. 2d 526 (2011), available at <http://westhamptonbeach.org/wp-content/uploads/2012/10/east-end-eruv-federal-complaint.pdf>.

18. Complaint at 1, *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, No. CV-123760 (E.D.N.Y. July 30, 2012), available at <http://westhamptonbeach.org/wp-content/uploads/2012/10/complaint-JPOE-against-village.pdf>.

19. *Id.*



The JPOE, therefore, relied on the First Amendment, just like the EEEA in its federal complaint in 2011. But while the EEEA took recourse to the Free Exercise Clause, the JPOE in its 2013 case turned to the Establishment Clause.<sup>20</sup> Both parties thus copied the strategies of the parties involved in the Tenaflly litigation. The conflict in Westhampton Beach, however, adds one interesting component, all publically documented, as we shall see momentarily.

I received the email cited above two weeks after the JPOE filed its lawsuit. The request was to provide an “academic” perspective, as opposed to one from a “purely religious” perspective. Presumably, this can be meant only in institutional terms, that is, to provide an academic scholar’s perspective, as opposed to a rabbi’s perspective. After some conversation, I decided to decline the invitation, as I considered myself incapable of providing expertise on behalf of one side in a conflict that I understand to be borne by local politics, in which I did not want to intervene. The lawyers for the JPOE sought testimony on the violation of the Establishment Clause in two main ways. I did provide them with citations of those pieces of my published work that seemed relevant to the case.

One component of the Establishment Clause argument concerns the nature of the plastic strips to be affixed to the public utility poles and whether indeed these are to be regarded as a religious symbol. As the plaintiffs argue, the plastic strips constitute “a constant and ever-present symbol, message, and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity.” They are a “symbol of their [cef, the orthodox community’s] particular kind of observance permanently affixed to and openly displayed on public property.”<sup>21</sup> If, so the argument goes, the *lechis* have to be perceived as religious symbols, the Village’s permission to the religious community to use property could constitute endorsement of a particular religious community and would therefore violate the Establishment Clause. However, part of the Endorsement Test introduced by Justice O’Connor into Religion-

20. See Schlaff, *supra* note 1, at 834–835 (providing the most extensive legal discussion of contemporary *eruv* controversies yet, focusing primarily on the Tenaflly case). Both the Establishment and Free Exercise arguments came up in the Tenaflly case. See Lees, *supra* note 1, at 54. Suffice it to say that I remain unconvinced that of all the contestations of religion in the public sphere the *eruv* would be a good tool to “untangle” the bewildering jurisprudence of the Supreme Court of the United States with regard to religion. See generally Vivian Berger, *Deep Divisions over Symbolic Boundary: Courts Have Ruled the ‘Eruv’ a Free Exercise Accommodation; Critics Say it Entangles Religion with Public Property*, 35 NAT’L L. J. 51, available at <http://www.vberger-mediator.com/mediation/eruv.html> (discussing, albeit briefly, only First Amendment issues involved in the Westhampton Beach dispute). The Supreme Court itself turned down the request of the City of Tenaflly to hear the case. See Lees, *supra* note 1, at 42.

21. Complaint, *supra* note 18, at 3–4.

Clause jurisprudence requires that “irrespective of governmental purpose . . . the reasonable and objective observer determines whether governmental action has the effect of endorsing religion.”<sup>22</sup>

## II. PUBLIC VISIBILITY OF RELIGIOUS DIFFERENCE AS A LEGAL ARGUMENT

This is where the dispute over the visibility of the *eruv* installment becomes important. The factor of visibility is at the center of almost every recent *eruv* controversy, in a variety of forms and shapes, and not only regarding the visibility of the *lechis* or poles and fishing-line themselves. This is the case also in the Westhampton Beach dispute. The complaint filed by the JPOE in July 2012, introduces the visibility issue in this way:

Although proponents of the *eruv* are quick to tout what they contend is the nearly invisible nature of the *lechis* [cef: the rabbinic legal term for the plastic strips] and other components of the *eruv*, it is those same proponents themselves who insist, based upon their particular interpretation of Jewish law, on the actual physical presence of the *eruv*. The *eruv*, of course, will *not* go unnoticed; rather, it will be a constant and ever-present symbol, message and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity.<sup>23</sup>

They emphasize that “indeed, the whole point of the *eruv*, for those who observe it, is to openly and visibly demarcate a certain geographic area as a Jewish precinct, i.e., a symbolic extension of a Jewish home.”<sup>24</sup> The JPOE refers to the *lechis* as a “religious display,” with which “JPOE and its members . . . will be confronted . . . on a daily basis.”<sup>25</sup>

The dispute over the symbolic nature of the *eruv* installation and the visibility of the *eruv* installation is not unique to the Westhampton controversy, although both the Tenaflly conflict and the controversy in North London<sup>26</sup> focused on different aspects of visibility, namely the change in

22. See Schlaff, *supra* note 1 at 837. The Endorsement Test was introduced in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), but although accepted by the majority, as discussed by Schlaff, it has been subject to criticism since it is far from clear what supposedly constitutes an observer standard.

23. Complaint, *supra* note 18, at 1–2.

24. *Id.* at 3.

25. *Id.* at 3. Even Wyatt Cenac in the *Daily Show*'s skit takes on the issue of visibility of the *eruv* installation with both parties—the opponents' side for exaggerating the *eruv*'s visibility, and the proponents' side for requiring something that is virtually invisible. *The Thin Jew Line*, *supra* note 8. See also Adam Mintz's Introduction to *IT'S A THIN LINE: ERUV FROM TALMUDIC TO MODERN CULTURE*, *supra* note 3, at xv.

26. See Lees, *supra* note 1, at 45–46; Robert C. Ash, *Mountains Suspended by a Hair: Eruv, a Symbolic Act by Which the Legal Fiction of Community is Established* 41, 239–42 (unpublished Ph.D. thesis, University of Leicester) (on file with University of Leicester Library).

the appearance of the neighborhood with supposedly more Orthodox Jews moving to town. Arguably, it would be easy enough to counter the argument over the visibility of the plastic strips on the utility poles (alias *lechis*) themselves and the other components of the *eruv*.<sup>27</sup> Anyone who has watched *The Daily Show*'s take on this will have to agree to that. That is, unless one knows that the *eruv* installation exists, a non-informed or reasonable and objective observer will not notice it, and most certainly not be able to decipher its function or meaning. Even the informed observer, who emerges from a long, drawn-out controversy such as the one in Palo Alto, Tenaflly, or London, will not "be confronted by" it or otherwise have his or her field of vision intruded upon in any significant way, as an "ever-present symbol."<sup>28</sup> This applies even to those cases, where there are no pre-existing utility poles and lines that can be used, and where, therefore, additional thin poles with fishing-lines have to be erected in order to span a street, which is not what was subject of debate in Westhampton Beach. As far as I know, no study exists to prove this point. If one were to stop the hundreds and perhaps thousands of cars that cross each day under the fishing-line spanning one of the major roads leading into the city of Palo Alto, and asked the drivers whether they had noticed that self-same fishing-line, or the posts on either side of the road supporting it, there is simply no doubt that not a single one of the drivers would be able to answer in the affirmative. The same would be true, even more so, for the *lechis* on the pre-existing utility poles. In that regard, these components of the *eruv* installation defy the semantic purpose of what makes a religious symbol a symbol, and a *religious* one at that, to a reasonable and objective observer: they are barely noticeable and do not bear any inherent significance or message. They are not readable in the way a cross is readable to the public, or the way even a menorah or a creche are readable, because they signify something in and of themselves. Compared to church, synagogue, and mosque buildings, and their minarets and steeples, the *eruv* constitutes a minimalist intervention in, and manipulation of, the built environment. Thus, the *lechis* mean nothing other than to those who rely on them as to their Sabbath observance. Arguably, however, it might be beyond the Court's jurisprudence to figure out what it is that constitutes a "religious" symbol.

27. Complaint, *supra* note 18, at 1–2 (detailing argument by plaintiffs).

28. This is aside from the fact that utility poles and the poles with fishing-line are not centrally located in the neighborhood but at the margins, and in that sense, already defy visibility.

### III. INTRA-JEWISH SECTARIANISM AS A LEGAL ARGUMENT

The second component of the complaint, however, is unique so far to the Westhampton Beach dispute, at least in its overt nature. The JPOE complaint seeks to cast the *eruv* installation as a sectarian Jewish project, and this is where the incorporation of the opposition of JPOE becomes relevant. The document spells out: “Many Jews reject the very concept of an *eruv*, and sincerely believe that the particular form of Jewish belief and observance that elevates such legalistic constructs over the true spiritual values of Judaism and the Sabbath is abhorrent to their own religious views and interpretation of Jewish law.”<sup>29</sup> This is an absolutely amazing move for a legal argument, since now the lawyers lay claim to an authentic (“true”) understanding of Judaism. They are taking recourse to a supposedly authoritative decision, issued by the rabbinic umbrella organization of Reform Judaism, the Central Conference of American Rabbis (CCAR). The lawyers read the CCAR’s recommendation to have rejected the *eruv* outright: “Indeed, it is the official position of the Central Conference of American Rabbi (‘CCAR’), . . . that an *eruv* is a sort of ‘legal fiction’ which is inconsistent with the true ‘spirit’ of Jewish law.”<sup>30</sup> In other words, the dispute is now cast as one over the correct interpretation of Sabbath law and its observance, rather than as one over divergent versions of Judaism. The Village’s permission for the *eruv* installation would therefore constitute an Establishment Clause infraction, as government would give preference to one side of an intra-religious dispute, or could be “reasonably seen and understood by them [cef: JPOE and its members] as endorsing particular

29. Complaint, *supra* note 18, at 2.

30. *Id.* Collections of rabbinic legal opinions constitute a historical practice that is part of traditional Jewish halakhic literature. See AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 207–10, 281–82, 362–63 (N.S. Hecht et al. eds., Oxford Univ. Press 1996). The Reform movement continues to think of its rabbinical opinions as *responsa*, even though the articulation of rabbinical opinions follows a very different style of legal argumentation and interpretation than traditional *responsa* literature. This is by no means to say that such opinions do not represent valid articulations of Judaism, authentic ones in their own right, any more or less than contemporary Jewish orthodox *responsa*. Reform *responsa* are readily available online at <http://ccarnet.org/rabbis-speak/reform-responsa/index/>, and this particular responsum can be found at <http://ccarnet.org/responsa/carr-268-269/>. In either case, Rabbi Wohl, who wrote the responsum in question in 1984, does not invoke the ‘true’ spirit of Jewish law. See *Contemporary American Reform Responsa: 178. Eruv*, CENT. CONF. OF AM. RABBIS (July 1983), <http://ccarnet.org/responsa/carr-268-269/>; see also Declaration of Rabbi David Saperstein at 2, *East End Eruv Ass’n v. Town of Southampton*, No. 2:13-cv-4810 (E.D.N.Y. Oct. 28, 2013) (Rabbi David Saperstein, who was then the Director and Counsel of the Religious Action Center of Reform Judaism in Washington D.C., declared that the wording of that responsum “is addressed to whether the Reform community believes the *eruv* is important for us to observe the Sabbath, not what a standard for the whole Jewish community ought to be”).

religious beliefs and practices that they do not hold or which they affirmatively oppose.”<sup>31</sup>

This is where two arguments that I advance in my reading of classical rabbinic law in its historical context came to play a role in legal argumentation: First, I have argued in print that the invention of the *eruv* in early rabbinic law could in that context be considered sectarian for the following reasons. We have strong textual evidence that a variety of Jewish groups and movements, such as represented in the Dead Sea Scrolls and the Book of Jubilees preceding the rabbinic texts, observed the prohibition of carrying objects out of the house, tent, or an otherwise private residence as one of the Sabbath prohibitions. The rabbis were the only ones to devise the *eruv* as a mechanism to allow Jews to do just that on the Sabbath.<sup>32</sup> But the point of considering the rabbinic legal strategy as in some way sectarian within the late ancient Jewish landscapes was to read the rabbinic strategies of casting the innovations of its own law making and legal interpretations of biblical law for what they were, namely *strategies* of persuading followers of the authoritativeness of their legal authority. Among scholars of classical rabbinic literature and law, this is a common view by now, beyond matters related to the *eruv*. The contemporary Jewish landscape in the United States is a very different religious and Jewish landscape compared to the late ancient, not least of all because by now the discourse and practice of *eruv* have been around for almost two millennia of Jewish cultural history. Therefore, it is difficult to construe the *eruv* as a misinterpretation of *Jewish* Sabbath law, even though the *biblical* Sabbath law does not contain much that would suggest such a construct. Nor does it make much sense to consider the *eruv* “sectarian” unless one considered rabbinic law (*halakhah*) altogether a sectarian form of Judaism. This is *not* to say that the institution of an *eruv* is the only possible, only appropriate, or even only authentic way to observe the Sabbath. Such determination is beyond the realm of scholarship and a matter of religious belief and interpretation.

Second, another argument I advance in my reading of classic rabbinic texts—one that I hold by—is that the institution of the *eruv* served the early rabbis as a mechanism to draw a distinction between insiders and outsiders, between those that belong, and those that are beyond the purview of the strictures of rabbinic law. Over the course of history, that distinction in general has taken on various valences, depending on historical circumstances, and certainly at times rabbinic scholars did not look upon those

31. Complaint, *supra* note 18, at 3.

32. Fonrobert, *supra* note 2, at 48–51.

beyond their purview with generosity and grace, to put it kindly. This the rabbis share with numerous other religious groups that define their identity by a variety of practices of belonging. The *eruv* is just one such strategy to draw a boundary between insider and outsider, in this case, by way of a spatial practice. The lawyer for JPOE, Jonathan Sinnreich, seized upon this historical and anthropological argument to underline the exclusionary mechanism of the *eruv*:

[I]t is a symbol that communicates a deliberately divisive and indeed exclusionary message, at least as understood within the larger Jewish community. This divisive and exclusionary meaning has been insightfully described by Professor Charlotte Elisheva Fonrobert.<sup>33</sup>

In some ways, this amounts to contesting in court that the Catholic Church excludes Protestants (and non-Jews) from its sacraments. That is to say, *of course* the project of defining a collective identity is to define boundaries between those who belong and those who do not, those who define themselves in those terms, and those who do not. The special force of the *eruv*, especially in its contemporary urban implementation, is to do so by installing what are perceived physical boundary markers in the urban landscape, thus by drawing on geography to underwrite collective identity.

Sinnreich is not the only one who simply equates the late ancient rabbis and their opponents with contemporary (modern) orthodox Jews and Reform and other liberal Jews or non-Jews. As an anthropologist, Susan H. Lees does so as well. She explains the acrimony of the Tenaflly dispute in the following way:

[The *eruv*] creates a kind of residential commune that, as in rabbinic days, excludes or distances non-Jews and co-resident Jews who are not believers or not observant of rabbinic law as understood by its members. I propose that this exclusion lies, in part, at the heart of the bitterness of the dispute in Tenaflly.<sup>34</sup>

However, the path from the ancient past to the contemporary Jewish scene in urban America is not a straight path, and clearly, exclusion in terms of self-distinction from others is not simply the same as exclusion as a political tool of majorities with respect to minorities.

## CONCLUSION

The practice of *eruv* presents us with a particular form of religious claim to the public, or publicness, and for that reason has seemed to so

33. Statement of Jonathan Sinnreich, Esq. on Behalf of Jewish People for the Betterment of Westhampton Beach, JEWISH PEOPLE OPPOSED TO THE ERUV 3 (April 4, 2013), available at [http://jpoewhb.com/uploads/PDF\\_Number\\_5.pdf](http://jpoewhb.com/uploads/PDF_Number_5.pdf).

34. Lees, *supra* note 1, at 46.

many to pose a challenge to First Amendment jurisdiction. Those involved in the recent controversies, as the one discussed above, argue in terms of First Amendment strictures and protection, whether by calling upon the Establishment Clause or the Free Exercise Clause. Anthropologists and ethnographers, as well as historians of religion such as myself, draw on different explanations to explain the potentiality for controversy built into the *eruv* installation.

By way of conclusion, I wish to emphasize one aspect of the *eruv* installation that escapes any firm grasp of the challenge that it really poses; that is what kind of claim to the public the *eruv* really poses. We have seen that visibility plays a role, yet the *eruv* installation is barely perceptible. Outright denial of perceptibility, however, does not help either with the resolution of the recent disputes,<sup>35</sup> since, from the days of the Mishnah onwards, rabbinic law does in fact require a manipulation of the urban environment, minute as it may be. The fact that classical rabbinic law did not conceive of any conflict regarding the manipulation of the urban environment as they conceived of it is telling with regard to the contemporary context. As pointed out above, in the ancient context, the rabbinic sages only considered manipulation of the entrance to a shared space because containing and contiguous walls pre-existed in the late ancient urban environment and were not considered an interference with one's daily life. In the contemporary context, the installation of symbolic gateways has to signify that there are also symbolic walls somewhere in the urban landscape, even if they are entirely symbolic and intangible, such as in the form of a creek that forms part of the boundary. Nonetheless, the very fact that now an *eruv* installation takes the form of inscriptions on maps, readily accessible online, clearly provides conceptual fodder for the perception that the Jewish community is laying claim to a geographical area of a town. Drawing maps of urban areas based on religious identity and practice is a form of laying claim to public space, however symbolic that may be. The fact that no one can see the plastic strips becomes totally insignificant in light of that.

35. In this regard, I think, Sinnreich has to be given credence in his federal complaint filed on behalf of JPOE when he argues that:

the suggestion that JPOE's members should not be concerned or offended by the prospect of the creation of an *eruv* to demarcate the neighborhoods where they live and work, because they 'won't notice it' or might somehow not understand what it symbolizes, is truly condescending and offensive to JPOE and its members.

Complaint, *supra* note 18, at 3. If the proponents cannot adequately explain the importance of the *eruv* for themselves, they are to be blamed for the failure of the *eruv* as a communal project.

The symbolic nature of the *eruv* is what requires public negotiation in order to explain such maps. And here I want to conclude with what I still consider the radical and subversive nature of the *eruv*, in spite of all the anxiety it has created in the recent conflicts: the *eruv* imposes a layer of meaning onto an urban map that is anchored minimally in the physical urban landscape. As a layer of meaning, it creates a new form of public—one that makes the urban environment legible in terms of ancient Jewish law, but in such a way that it would allow for any other forms of public to be part of it. An *eruv* may include a church parish, as it most certainly does in the case of larger urban *eruvim*, and thus include the form of public that the parish establishes. It may include the White House or the European Parliament and thus the most public form of public imaginable. In such cases, the *eruv* adds a dimension rather than shielding or suppressing another. It defies all forms of isomorphism that require an equation between collective identity and physical environment. And it is this dimension that has yet to play out its full potential.



